Danga Bay Sdn Bhd v Hamimah bt Hussin & Anor (Affin Islamic Bank Bhd, third party)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02 (NCvC) (W)-2528–12 OF 2018
HARMINDER SINGH, SURAYA OTHMAN AND AZIZAH NAWAWI JJCA
9 DECEMBER 2020

Contract — Frustration — Cancellation of project — In lieu of receiving damages ('LAD') from developer 'A' for late delivery of their house under construction, buyers accepted developer's offer of another house in another project built by developer 'B' — Developer 'B' aborted work on project because its shareholders unanimously decided it was commercially not viable — Whether developer 'A's agreement with buyers to give them house in lieu of damages was rendered impossible of performance under s 57(2) of the Contracts Act 1950 — Whether developer 'A' was not responsible for and could not have foreseen change in circumstances that rendered its agreement with buyers impossible of performance — Whether it was unjust for buyers to require developer 'A' to pay them value of the house they could have obtained under the agreement

Pursuant to a sale and purchase agreement ('SPA'), the respondents agreed to buy a RM6.5m bungalow ('Monte Carlo') from the appellant and took a RM5m loan from the third party ('Affin Bank') to finance the purchase. The appellant failed to deliver vacant possession of Monte Carlo to the respondents by 24 October 2014 as agreed under the SPA but promised to do so by 30 April 2015. In lieu of having to pay the respondents late delivery damages for Monte Carlo, the appellant offered them another property ('Acquaint Danga Residensi') which was to be built by another developer ('Para Impiana'). The respondents accepted the offer but when 30 April 2015 came, the appellant could neither deliver up vacant possession of Monte Carlo nor the Acquaint Danga Residensi ('ADR') unit to the respondents. In the latter case, it was because Para Impiana had aborted the project on its shareholders' unanimous decision to do so for commercial reasons. On 4 May 2016, the appellant informed the respondents that it was ready to deliver up vacant possession of Monte Carlo and to pay them liquidated damages for late delivery ('LAD') in the sum of RM999,698.63 pursuant to cl 22(2) of the SPA. The respondents rejected the said sum and sued the appellant for, inter alia: (a) a declaration that the appellant had breached the late delivery clause under the SPA; (b) a declaration that pursuant to the appellant's settlement offer, the respondents were entitled to the ADR unit or an equivalent property of the same price/value, or, alternatively, the sum of RM1,740,000 being the value of the ADR unit; and (c) alternatively, damages for loss of use of Monte Carlo from

24 October 2014 until the date vacant possession of same was given. The appellant denied the respondents' claim and counterclaimed for RM102,547.95 being interest due on late payment of the balance purchase price under the SPA. The respondents denied the delay and claimed that if there was any delay, it was caused by Affin Bank. The bank was added as the third party to the suit. The judicial commissioner ('JC') of the High Court decided in favour of the respondents, awarded them RM1,473,717.19 as damages (being the market value of the ADR unit), and ordered the sum of RM102,547.95 to be apportioned equally between the appellant, the respondents and the third party after finding that all the said parties were equally responsible for the delay. The JC held that the appellant's agreement to give the respondents an ADR unit in lieu of paying them LAD for Monte Carlo was valid and was not frustrated by Para Impiana's decision not to proceed with the ADR project. The JC accepted the respondents' argument that since the appellant and Para Impiana shared a common business and registered address, had a common director and the same company secretaries, they were related and that was the reason the appellant was able to offer the ADR unit to the respondents. The JC found that since the appellant shared, and did not object to, Para Impiana's decision not to proceed with the ADR project because of poor response to the sale of those units, it could not rely on the doctrine of frustration to say that its promise to deliver the ADR unit to the respondents was rendered impossible of performance. In the instant appeal against the JC's decision, Affin Bank cross-appealed to set aside the order that it was liable to pay one-third of the appellant's counterclaim against the respondents.

Held, unanimously allowing the appeal, setting aside the JC's decision, ordering the appellant to pay the respondents the admitted LAD sum of RM993,698.63, allowing the appellant's counterclaim and Affin Bank's cross-appeal to set aside the order that it was liable to pay one-third of the appellant's counterclaim:

(1) The appellant had established the requirements of s 57(2) of the Contracts Act 1950 and its prayer for a declaration that its settlement agreement ('SA') with the respondents was void due to frustration was allowed. It followed that no damages could flow from the SA. Therefore, the JC's order that the appellant pay the respondents damages in the sum of RM1,473,717.19, being the market value of the ADR unit, ought to be set aside (see para 38).

(2) The JC erred in finding that the appellant was connected to Para Impiana from the mere fact they shared a common address and from the appellant's offer of the ADR unit to the respondents. It was mere conjecture on the JC's part. The respondents failed to prove their pleaded case that the appellant and Para Impiana were controlled by the same decision-maker. The purported decision-maker was never identified during the trial. The JC failed to consider the appellant's evidence that

the appellant was never part of Para Impiana and that the unanimous decision to halt the ADR project was made by Para Impiana's shareholders based on commercial considerations during an extra-ordinary general meeting on 7 July 2015. The JC failed to consider the settled principles of separate corporate identity. Based on the evidence, there was no nexus between the appellant and Para Impiana in order to bind the appellant with Para Impiana's decision to halt the ADR project. The only reasonable conclusion that could be made from the evidence that was before the JC was that the ADR project was not commercially viable to be proceeded with because of the lack of buyers for the ADR units. The JC's finding that the project could have generated sales if it had continued was not supported by any evidence (see paras 27–30 & 34).

(3) There was nothing in the settlement agreement to deal with the circumstances if the ADR project was halted. It was in evidence that such circumstances were never discussed not contemplated in the discussions between the parties. The appellant submitted that it was never involved in Para Impiana's decision to halt the ADR project. At the time the project was launched, the appellant never knew that the sales response would be so bad that the project would be shelved. It was not something the appellant foresaw when it offered the ADR unit to the respondents. There was, therefore, no evidence to support the JC's finding that the cancellation of the ADR project was self-induced and that the appellant could not rely on the doctrine of frustration. The change in circumstances was beyond the appellant's control and it was unjust if the settlement agreement, which became practically impossible for the appellant to perform, was enforced against it (see paras 22–23 & 35–37).

(4) In view of the admission by the appellant that the LAD under cl 22(2) of the SPA was RM993,698.63, this sum was allowed to the respondents. Because of the admission, there was no necessity to assess the damages (see paras 41–42).

(5) The JC's apportionment of one-third liability (RM34,182.65) to the appellant for interest on late payment was not supported by the respondents' pleaded case. They had not pleaded contributory delay on the appellant's part in facilitating the release of the loan from Affin Bank. The JC erred in law in going outside the ambit of the respondents' pleaded defence to the appellant's counterclaim. It was not the JC's duty to assist the respondents by creating the defence of contributory delay on the appellant's part (see paras 46–47).

(6) The JC erred in holding that Affin Bank was one-third responsible for the late payment interest because it delayed the release of the respondents' housing loan. The respondents failed to prove on balance of probabilities that Affin Bank caused the delay and thereby caused the imposition of the

late payment interest. On the facts, Affin Bank was not responsible for the delay in the disbursement because it could only effect the disbursement once all the documentation had been secured, namely, the memorandum of transfer and charge had been registered, the respondents had complied with the conditions of the letter of offer dated 15 August 2012 and had accepted the letter of variation dated 4 October 2013. All these relevant evidences were crucial as they fell within the appellant's counterclaim but the JC failed to take them into account (see paras 55–56).

[Bahasa Malaysia summary

Menurut satu perjanjian jual beli ('PJB'), responden-responden bersetuju untuk membeli banglo RM6.5 juta ('Monte Carlo') daripada perayu dan telah mengambil pinjaman daripada pihak ketiga ('Affin Bank') untuk membiayai belian tersebut. Perayu telah gagal untuk menyerahkan milikan kosong Monte Carlo kepada responden-responden sebelum atau pada 24 Oktober 2014 sepertimana dipersetujui di bawah PJB tetapi berjanji untuk berbuat sedemikian sebelum atau pada 30 April 2015. Sebagai menggantikan untuk membayar responden-responden ganti rugi serahan lewat untuk Monte Carlo, perayu telah menawarkan mereka satu lagi hartanah ('Acquaint Danga Residensi') yang dibina oleh pemaju lain ('Para Impiana'). Responden-responden telah menerima tawaran tersebut tetapi menjelang 30 April 2015, perayu tidak dapat menyerahkan milikan kosong unit Monte Carlo mahu pun Acquaint Danga Residensi ('ADR') kepada responden-responden. Dalam kes ADR, ia adalah kerana Para Impiana telah membatalkan projek itu atas keputusan sebulat suara pemegang-pemegang sahamnya untuk berbuat sedemikian oleh sebab-sebab komersial. Pada 4 Mei 2016, perayu telah memberitahu responden-responden bahawa ia bersedia untuk menyerahkan milikan kosong Monte Carlo dan untuk membayar mereka ganti rugi jumlah tertentu untuk serahan lewat ('LAD') berjumlah RM999,698.63 menurut klausa 22(2) PJB tersebut. Responden-responden telah menolak jumlah tersebut dan menyaman perayu untuk, antara lain: (a) satu deklarasi bahawa perayu telah melanggar klausa serahan lewat di bawah PJB terebut; (b) satu deklarasi bahawa menurut tawaran penyelesaian perayu, responden-responden berhak kepada unit ADR itu atau hartanah yang sama harga/nilai, atau, secara alternatif, jumlah RM1,740,000 yang merupakan nilai unit ADR itu; dan (c) secara alternative, ganti rugi untuk kerugian menggunakan Monte Carlo dari 24 Oktober 2014 sehingga tarikh milikan kosong yang sama diberikan. Perayu menafikan tuntutan responden-responden dan menuntut balas untuk RM102,547.95 sebagai faedah yang perlu dibayar untuk bayaran lewat baki harga belian di bawah PJB tersebut. Responden-responden telah menafikan kelewatan itu dan mendakwa bahawa jika terdapat apa-apa kelewatan, ia disebabkan oleh Affin Bank. Bank tersebut telah ditambah sebagai pihak ketiga kepada guaman itu. Pesuruhjaya kehakiman ('PK') Mahkamah Tinggi telah memutuskan bagi menyebelahi

responden-responden, mengawardkan mereka RM1,473,717.19 sebagai ganti rugi (yang merupakan nilai pasaran untuk unit ADR), dan memerintahkan sejumlah RM102,547.95 untuk dibahagikan sama rata antara perayu, responden-responden dan pihak ketiga selepas mendapati bahawa semua pihak-pihak tersebut sama-sama bertanggungjawab untuk kelewatan itu. PK tersebut telah memutuskan bahawa perjanjian perayu untuk memberikan responden-responden unit ADR yang menggantikan untuk membayar mereka LAD bagi Monte Carlo adalah sah dan tidak dikecewakan oleh keputusan Para Impiana untuk tidak meneruskan dengan projek ADR. PK tersebut telah menerima hujah responden-responden bahawa memandangkan perayu dan Para Impiana berkongsi perniagaan dan alamat berdaftar yang sama, mempunyai pengarah sama dan setiausaha syarikat sama, mereka adalah berkaitan dan itu adalah sebab perayu dapat menawarkan unit ADR tersebut kepada responden-responden. PK tersebut mendapati bahawa memandangkan perayu berkongsi, dan tidak membantah kepada, keputusan Para Impiana untuk tidak meneruskan dengan projek ADR kerana kurang sambutan terhadap jualan unit-unit tersebut, ia tidak boleh bergantung kepada doktrin kekecewaan untuk mengatakan bahawa janjinya untuk menyerahkan unit ADR itu kepada responden-responden menjadi mustahil untuk dilaksanakan. Dalam rayuan ini terhadap keputusan PK tersebut, Affin Bank telah membuat rayuan balas untuk mengetepikan perintah itu bahawa ia bertanggungjawab untuk membayar satu pertiga daripada tuntutan balas perayu terhadap responden-responden.

Diputuskan, sebulat suara membenarkan rayuan, mengetepikan keputusan PK tersebut, memerintah perayu untuk membayar responden-responden LAD yang diterima sejumlah RM993,698.63, membenarkan tuntutan balas perayu dan rayuan balas Affin Bank untuk mengetepikan perintah itu bahawa ia bertanggungjawab untuk membayar satu pertiga daripada tuntutan balas perayu:

(1) Perayu telah membuktikan keperluan s 57(1) Akta Kontrak 1950 dan permohonannya untuk satu deklarasi bahawa perjanjian penyelesaiannya ('PP') dengan responden-responden adalah terbatal akibat kekecewaan telah dibenarkan. Adalah diikuti bahawa tiada ganti rugi boleh diperoleh daripada PP tersebut. Oleh demikian, perintah PK agar perayu membayar responden-responden ganti rugi sejumlah RM1,473,717.19, iaitu nilai pasaran unit ADR, patut diketepikan (lihat perenggan 38).

(2) PK tersebut telah terkhilaf kerana mendapati perayu berkait dengan Para Impiana hanya berdasarkan fakta mereka berkongsi alamat sama dan berdasarkan tawaran perayu berhubung unit ADR kepada responden-responden tersebut. Ia hanya sangkaan di pihak PK. Responden-responden telah gagal membuktikan kes yang dirayu oleh mereka bahawa perayu dan Para Impiana dikawal oleh pembuat keputusan yang sama. Pembuat keputusan dikatakan itu tidak pernah

dikenal pasti semasa perbicaraan. PK tersebut telah gagal mempertimbangkan keterangan perayu bahawa perayu bukan sebahagian Para Impiana dan bahawa keputusan sebulat suara untuk menghentikan projek ADR tersebut telah dibuat oleh pemegang-pemegang saham Para Impiana berdasarkan pertimbangan komersial semasa mesyuarat agong luar biasa pada 7 Julai 2015. PK tersebut telah gagal mempertimbangkan prinsip yang telah ditetapkan berhubung identiti korporat berasingan. Berdasarkan keterangan, tiada kaitan antara perayu dan Para Impiana bagi tujuan mengikat perayu dengan keputusan Para Impiana untuk menghentikan projek ADR. Hanya kesimpulan munasabah yang boleh dibuat berdasarkan keterangan di hadapan PK tersebut adalah bahawa projek ADR itu tidak berdaya maju secara komersial untuk diteruskan kerana pembeli yang kurang untuk unit-unit ADR tersebut. Dapatan PK tersebut bahawa projek itu mungkin boleh menghasilkan jualan jika ia diteruskan tidak disokong oleh apa-apa keterangan (lihat perenggan 27–30 & 34).

(3) Tiada apa-apa dalam perjanjian penyelesaian untuk menangani keadaan jika projek ADR dihentikan. Adalah dalam keterangan bahawa keadaan sedemikian tidak pernah dibincangkan tidak dipertimbangkan dalam perbincangan antara pihak-pihak. Perayu berhujah bahawa ia tidak pernah terlibat dalam keputusan Para Impiana untuk menghentikan projek ADR. Pada masa projek itu dilancarkan, perayu tidak mengetahui bahawa sambutan jualan agak teruk sehingga projek tersebut ditangguhkan. Ia bukan suatu yang diramalkan oleh perayu apabila ia menawarkan unit ADR itu kepada responden-responden. Oleh demikian, tiada keterangan yang menyokong dapatan PK bahawa pembatalan projek ADR itu adalah suatu yang disebabkan oleh diri sendiri dan bahawa perayu tidak boleh bergantung kepada doktrin kekecewaan. Perubahan dalam keadaan adalah di luar kawalan perayu dan ia tidak adil jika perjanjian penyelesaian itu, yang menjadi mustahil dari segi praktikal untuk dilaksanakan oleh perayu, dikuatkuasakan terhadapnya (lihat perenggan 22–23 & 35–37).

(4) Berdasarkan pengakuan oleh perayu bahawa LAD di bawah klausa 22(2) PJB tersebut adalah RM993,698.63, jumlah ini telah dibenarkan kepada responden-responden. Oleh kerana pengakuan itu, tiada keperluan untuk mentaksir ganti rugi (lihat perenggan 41–42).

(5) Pembahagian PK agar satu pertiga liabiliti (RM34,182.65) kepada perayu untuk faedah kerana bayaran lewat tidak disokong oleh kes yang dipli oleh responden-responden. Mereka tidak mempli untuk penyumbang kelewatan di pihak perayu bagi memudahkan pelepasan pinjaman dari Affin Bank. PK terkhilaf dari segi undang-undang kerana terkeluar dari skop pembelaan yang dipli responden-responden terhadap tuntutan balas perayu. Ia bukan kewajipan PK untuk membantu

responden-responden dengan mewujudkan pembelaan untuk penyumbang kelewatan di pihak perayu (lihat perenggan 46–47).

(6) PK telah terkhilaf apabila memutuskan bahawa Affin Bank adalah satu pertiga bertanggungjawab untuk faedah pembayaran lewat kerana ia menangguhkan pelepasan pinjaman perumahan responden. Responden gagal membuktikan keseimbangan kebarangkalian bahawa Affin Bank menyebabkan kelewatan dan dengan itu menyebabkan pengenaan faedah pembayaran lewat. Pada fakta, Affin Bank tidak bertanggungjawab terhadap kelewatan pembayaran kerana ia hanya boleh menjelaskan pembayaran sebaik sahaja semua dokumentasi telah diperolehi, iaitu memorandum pemindahan dan caj telah didaftarkan, responden telah mematuhi syarat-syarat surat tawaran bertarikh 15 Ogos 2012 dan telah menerima surat perubahan bertarikh 4 Oktober 2013. Semua bukti yang berkaitan ini sangat penting kerana ia jatuh dalam tuntutan balas perayu tetapi PK gagal untuk mengambil kira (lihat perenggan 55–56)]

Cases referred to

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Goh Yew Chew & Anor v Soh Kian Tee [1970] 1 MLJ 138, FC (refd)

Guan Aik Moh (KL) Sdn Bhd & Anor v Selangor Properties Bhd [2007] 4 MLJ 201; [2007] 3 CLJ 695, CA (folld)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)

Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor [2009] 6 MLJ 293, FC (refd)

Paya Terubong Estates Sdn Bhd v Pusaka Warisan Sdn Bhd [1998] 2 MLJ 463; [1998] 2 CLJ 909, CA (refd)

People's Insurance Co (M) Sdn Bhd v People's Insurance Co Ltd & Ors [1986] 1 MLJ 68 (refd)

RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd [2010] 2 MLJ 188, FC (refd)

Solomon v Solomon & Co [1897] AC 22, HL (refd)

Legislation referred to

Contracts Act 1950 s 57, 57(2)

Appeal from: Civil Suit No JA-22NCvC-52–03 of 2017 (High Court, Johor Bahru)

LM Looi (SS Ding with him) (Dennis Nik & Wong) for the appellant.
Faizal bin Abu Bakar (Tan Sing Yee with him) (Faizal Siow Brocket & Cho) for the respondent.

R Jayabalan (Norman Fernandez with him) (C Sukumaran & Co) for the third party.

Azizah Nawawi JCA:

INTRODUCTION

[1] The appellant is appealing against the decision of the learned judicial commissioner ('JC') dated 19 November 2018, allowing the respondent's claim for damages for a breach of contract for the sum of RM1,473,717.19.

[2] The third party, Affin Islamic Bank Bhd ('Affin Bank') had filed a cross-appeal against the finding of the learned JC that Affin Bank was liable to a third (1/3) of interest on late payment, in the sum of RM34,182.65, to be paid to the appellant.

[3] Having considered the appeal record and the submissions of the parties, this court had allowed the appeal, set aside the sum RM1,473,717.19 granted by the learned JC and substituted the same with the alternative prayer for damages in the sum of RM993,698.63, the sum which was offered by the appellant as damages for late delivery. We had also allowed Affin Bank's cross-appeal with costs. Our decision was unanimous and these are our grounds for allowing the appeal and cross-appeal. For ease of reference, parties will be referred to as they were in the High Court.

THE SALIENT FACTS

[4] Pursuant to a sale and purchase agreement dated 25 October 2012 ('SPA') the plaintiffs had purchased a double-storey bungalow unit known as 'Monte Carlo' for RM6.5m from the defendant. The vacant possession was to be delivered within 24 months, by 24 October 2014.

[5] For the said purchase, the plaintiffs had obtained loan facilities from Affin Bank for RM5m.

[6] However, the defendant had failed to deliver vacant possession of the 'Monte Carlo' by 24 October 2014. Following this, vide a letter of offer dated 10 April 2015, the defendant agreed to deliver vacant possession by 30 April 2015 and offered another property ('Acquaint Danga Residensi') as settlement of the late delivery damages ('settlement agreement'). The Acquaint Danga Residensi project was developed by Para Impiana Sdn Bhd ('developer'). However, this development was subsequently shelved by the developer.

[7] The defendant's offer was accepted by the plaintiffs. The defendant however failed to deliver vacant possession of the 'Monte Carlo' by 30 April 2015 and had also failed to deliver the Acquaint Danga Residensi property.

[8] Due to the defendant's failure to deliver vacant possession on 30 April 2015, the plaintiffs issued a notice of demand dated 6 October 2015. By a reply dated 6 November 2015, the defendant admitted to the delay to deliver the 'Monte Carlo'.

[9] By a letter dated 4 May 2016, the defendant stated that it was ready to deliver vacant possession of 'Monte Carlo' to the plaintiffs and to pay liquidated damages for late delivery in the sum of RM993,698.63 ('LAD') pursuant to cl 22(2) of the SPA.

[10] The defendant's offer of RM993,698.63 in late delivery damages was rejected by the plaintiffs, who were seeking a sum which is equivalent to the value of the Acquaint Danga Residensi, a sum of RM1,740,000.

[11] The plaintiffs then commenced this claim for the following prayers:

(a) a declaration that the defendant had breached cl 22(1) of the SPA on late delivery;

(b) a declaration that the letter of offer dated 10 April 2015 is valid and that the plaintiffs are entitled to a unit of the Acquaint Danga Residensi;

(c) a declaration that the letter of offer dated 10 April 2015 gives the plaintiffs the right to a unit of the Acquaint Danga Residensi or another property of the same price/value as Acquaint Danga Residensi;

(d) alternatively, the plaintiff to be compensated damages in the sum equivalent to the value of the Acquaint Danga Residensi, at RM1,740,000;

(e) alternatively, damages to be assessed 'atas ganti rugi kehilangan penggunaan hartanah tersebut' from 24 October 2014 to the date of delivery of vacant possession; and

(f) special damages, interest and costs.

[12] The defendant denied the plaintiffs' claim and filed a counterclaim for a declaration that the letter of offer dated 10 April 2015 is void due to frustration, and for a sum of RM105,424.70 as late payment interest under the SPA for late payment of balance purchase price.

[13] The plaintiffs denied that there was any delay in the final payment and contended that the delay, if any, was caused by their financiers, Affin Bank. The plaintiffs then issued third party proceedings against Affin Bank.

DECISION OF THE HIGH COURT

[14] Before the High Court, two issues were raised:

(a) whether the settlement agreement between the plaintiff and the defendant was void due to frustration; and

(b) whether the plaintiffs were liable to pay the defendants the sum of RM102,547.95 as interest on late payment under the SPA dated 25 October 2012.

[15] On the first issue, the learned JC held that the settlement agreement was not void due to frustration because the frustrating event was self-induced. Consequentially, the learned JC proceeded to find that the plaintiffs were entitled to the sum of RM1,473,717.19 as compensation, being the market value of the Acquaint Danga Residensi.

[16] On the second issue, the learned JC held that each party was equally liable to a third (1/3) of the sum of RM102,547.95 as late payment interest.

OUR DECISION

[17] We were mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance. In the case of *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19 the Court of Appeal held as follows:

> ... an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence.

[18] Reference is also made to the decision of the Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 where the Federal Court held that the test of 'insufficient judicial appreciation of evidence' adopted by the Court of Appeal was in relation to the process of determining whether or not the trial court had arrived at its decision or findings correctly on the basis of the relevant law and the established evidence.

Whether the settlement agreement was void due to frustration

[19] It is not in dispute that there had been a delay in the delivery of the 'Monte Carlo' property under the SPA. The parties then agreed that the LAD under the SPA would be paid vide the Acquaint Danga Residensi under the settlement agreement. This did not materialise when the Acquaint Danga Residensi project was shelved by the developer. Therefore the core issue here is whether the settlement agreement was frustrated pursuant to s 57 of the Contracts Act 1950, which reads:

> 57 Agreement to do impossible act
>
> (1) An agreement to do an act impossible in itself is void.
>
> *Contract to do act afterwards becoming impossible or unlawful*
>
> (2) A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, becomes void when the act becomes impossible or unlawful.
>
> *Compensation for loss through non-performance of act known to be impossible or unlawful*
>
> (3) Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, the promisor must make compensation to the promisee for any loss which the promisee sustains through the non-performance of the promise.

[20] Subsection 57(2) provides that a contract to do an act, which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, becomes void when the act becomes impossible or unlawful. Therefore, a contract is frustrated, when after the contract has been made, the act becomes either impossible or unlawful. In the case of *Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor* [2009] 6 MLJ 293 at p 303 at para 22, the Federal Court states as follows:

> A contract does not become frustrated merely because it becomes difficult to perform. If a party has no money to pay his debt, it cannot be considered impossible to perform as it is not frustration. Neither can he plead frustration because the terms of the contract make it difficult to interpret. If it cannot be performed or becomes unlawful to perform, then the party who is to perform his part of the bargain can plead frustration. The doctrine of frustration is only a special case to discharge a contract by an impossibility of performance after the contract was entered into (see *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154 (HL)). A contract is frustrated when subsequent to its formation, a change of circumstances renders the contract legally or physically impossible to be performed (see Visu Sinnadurai, *Law of Contract in Malaysia and Singapore: Cases and Commentary* (2nd Ed, 1987) at p 519).

[21] In the Court of Appeal case of *Guan Aik Moh (KL) Sdn Bhd & Anor v Selangor Properties Bhd* [2007] 4 MLJ 201; [2007] 3 CLJ 695, the court

explained that three elements must be present to show that a contract has been frustrated. They are as follows:

(a) the event upon which the promisor relies must have been one for which no provision has been made in the contract;

(b) the event relied upon by the promisor must be one for which he or she is not responsible; and

(c) the event which is said to discharge the promise must be such that renders it radically different from that which was undertaken by contract.

No provision in the settlement agreement

[22] Applying the above principle to our present appeal, in respect of the first element, that 'no provision has been made in the contract', we agree with the defendant that there is nothing in the settlement agreement to deal with the circumstances if the Acquaint Danga Residensi project was halted. This is supported by the evidence of Kam Wooi Chee ('DW1') in his witness statement that the circumstances if the project known Acquaint Danga Residensi was halted was never discussed nor contemplated during the discussions between the parties. This position was also taken by the plaintiffs through the evidence of PW3, the first plaintiff.

Whether the event was self-induced

[23] The second element is to ascertain whether the 'event relied upon by the promisor must be one which he is not responsible'. On this issue, the defendant had submitted that the event being relied upon the defendant was that the project Acquaint Danga Residensi was halted by the developer, and that the defendant was not involved in the decision made by the developer.

[24] However, the plaintiffs took the position that both the defendant and the developer were related companies on the following grounds:

(a) that they shared a common business and registered address;

(b) that they shared one common director, Lim Chen Herng; and

(c) that they have the same company secretaries, Lim Thiam Wah and Lim Aik Yong.

[25] Premised on the close relationship between the defendant and the developer, the plaintiffs submitted that the defendant was involved in the frustrating event, that is the decision by the developer to halt the Acquaint Danga Residensi. As such, since the defendant was complicit in the decision to

halt the Acquaint Danga Residensi project, the defendant cannot rely on the doctrine of frustration, as self-induced frustration is ineffective.

[26] The above submission was accepted by the learned JC, who made the following finding in paras (20) and (23) of the judgment:

> 20. Looking at the evidence of the defendant and Para Impiana Sdn Bhd sharing a common address, I am not persuaded by the testimony of the defendant's witness DWI that the two companies were truly separate legal entities even though technically the shareholding record may suggest so. If the two companies were not at all connected, there would hardly be any business efficacy for the defendant to offer the Acquaint Danga Residensi unit to the plaintiffs under the circumstances.
>
> ...
>
> 23. ... Clearly, the defendant was of the same mind and did not object to the project being aborted.

[27] We are of the considered opinion that the learned JC fell into error when he made a finding that the defendant was connected to the developer from the mere sharing of common address and from the offer of a unit of the Acquaint Danga Residensi. We agree with the defendant that this is mere conjecture on the part of the learned JC. Added to that, we find that the plaintiffs fell short at proving their pleaded case that the defendant and the developer 'adalah dikuasai dan dikawal oleh pembuat keputusan yang sama'. There is simply no evidence that the purported decision maker, who controlled both the defendant and the developer, was ever identified by the plaintiffs during the trial.

[28] Added to that, we find that the learned JC had failed to consider the evidence of DW2, the company secretary of both the defendant and the developer. DW2 gave evidence that the shareholders of the developer were Skyfront Holdings Pte Ltd, Rampai Fokus Sdn Bhd and Imperial Marina Pte Ltd. The defendant was never part of the developer. DW2 also gave evidence that the decision to halt the Acquaint Danga Residensi project was made by the shareholders of the developer during the extraordinary general meeting on 7 July 2015, which was adjourned to 11 August 2015. It was also the evidence of DW2 that it was a unanimous decision by the shareholders based on commercial considerations.

[29] Therefore, in making the above findings, we are of the considered opinion that the learned JC had failed to consider the settled principles of separate corporate identity and the rule in *Solomon v Solomon & Co* [1897] AC 22. In *People's Insurance Co (M) Sdn Bhd v People's Insurance Co Ltd & Ors* [1986] 1 MLJ 68, Zakaria Yatim J held that even a parent company is a distinct legal entity from its wholly owned subsidiary company.

[30] As such, the learned JC in making a tenuous connection between the defendant and the developer from the mere sharing of common address, fell into error in his attempt to link the developer's decision to halt the Acquaint Danga Residensi with the defendant. Having considered the evidence before the JC, we are of the considered opinion that there was no nexus between the defendant and the developer in order to bind the defendant with the decision of the developer to halt the Acquaint Danga Residensi project.

[31] Having made the tenuous connection between the defendant and the developer, the learned JC then proceeded to challenge the decision to halt the Acquaint Danga Residensi project. In his judgment, the learned JC made the following findings:

> 22. Based on the facts, I would then go on to find that the defendant would not be entitled to rely on the doctrine of frustration to render the letter of offer to be null and void. The decision not to proceed to build the Acquaint Danga Residensi project was a commercial decision which was deliberately taken premised on the sales of units therein being poor. If the project had gone ahead, there was no evidence that the units, once completed, would not receive the desired sales. It would appear that the project owners did not want to commit, or perhaps did not have the capital (assisted by the deposits from units sold, which were not enough) to forge ahead.
>
> 23. As between the defendant and the Para Impiana Sdn Bhd the developer of Acquaint Danga Residensi, there was no question of impossibility. As far as the developer of Acquaint Danga Residensi was concerned, it was purely a matter of risk assessment and management that it did not want to proceed with the development of the Acquaint Danga Residensi. Clearly, the defendant was of the same mind and did not object to the project being aborted.

[32] We cannot comprehend how the learned JC had arrived at the above findings. The only evidence on the Acquaint Danga Residensi project was given by the defendant's witnesses. The plaintiff did not give any evidence on the said project. The evidence of the defendant's witness, DW2 was that the developer had secured credit facilities from OCBC Bank (M) Bhd ('OCBC Bank') to finance the Acquaint Danga Residensi project. Under the 'special conditions' of the credit facilities, 50% of the loan (RM23m) would only be disbursed upon the achievement of 60% sales of the project or RM178.1m, whichever is higher.

[33] However, as at July 2015, the actual sales of the project was only 6.5% of the project. DW2 further gave evidence that the developer had incurred RM33,152,776 of development expenditure for its sole project, the Acquaint Danga Residensi. Added to that, the developer had incurred further expenses to promote the project in Malaysia, Singapore, Indonesia and Hong Kong. Despite the extensive promotions, the project failed to garner the required

sales. In view of the significant expenditures incurred and the low sales in respect of the project, which had failed to meet the requirement of OCBC Bank, an extraordinary general meeting was called on 7 July 2015, which was adjourned to 11 August 2015. In the said meetings, the shareholders of the developer had passed a resolution to halt the Acquaint Danga Residensi project.

[34] From the evidence before the learned JC, the only reasonable conclusion was that the Acquaint Danga Residensi project was not commercially viable to proceed with. The learned JC's finding that the project could generate sales if it had continued was not supported by any evidence. In any event, we agree with the defendant that it is commercially impossible to proceed with the project when there is no buyer to the project despite the aggressive marketing both locally and internationally. In *Goh Yew Chew & Anor v Soh Kian Tee* [1970] 1 MLJ 138 at p 141, the Federal Court had adopted *Chitty on Contracts* (22nd Ed) which stated as follows:

> The doctrine of frustration is relevant when it is alleged that a change of circumstances after the formation of the contract renders it physically or commercially impossible to fulfill the contract. *The doctrine is not concerned with initial impossibility which renders a contract void ab initio,* as where a party to a contract undertakes to perform an act which, at the time the contract is made, is physically impossible according to existing scientific knowledge and achievement.

[35] Therefore, we find that the circumstances in relation to the project was not something which was foreseeable by the defendant when it had agreed to offer a unit of the Acquaint Danga Residensi project as payment for the LAD for the late delivery of the 'Monte Carlo' under the SPA. At the time when the Acquaint Danga Residensi project was launched, the defendant never knew that the sales response would be so bad that the developer would subsequently shelved the project. Therefore, the learned JC had clearly made an error in his finding that the '... defendant was of the same mind and did not object to the project being aborted'.

[36] As such, we find that there was no evidence to support the learned JC's finding that the cancellation of the Acquaint Danga Residensi was self-induced, and that it would not amount to frustration. The cancellation of the Acquaint Danga Residensi project was not self-induced by its developer. In any event, the defendant had nothing to do with the decision to cancel the Acquaint Danga Residensi project.

Whether it would be unjust to enforce the settlement agreement

[37] In respect of the third element that 'it would be unjust to enforce the original promise', we are of the considered opinion and we agree with the

defendant that it would not be possible for the Acquaint Danga Residensi parcel to be delivered by the defendant to the plaintiffs when the entire Acquaint Danga Residensi Project had been halted by the developer on sound commercial grounds. Therefore, it would be unjust to the defendant if the settlement agreement was to be enforced when it became practically impossible for the defendant to perform as the whole project had been halted by the developer. The developer had even terminated the advertising permits and developer's license for the Acquaint Danga Residensi Project. We find that the change in the circumstances was beyond the control of the defendant and therefore it would be unjust to the defendant to enforce the settlement agreement.

Settlement agreement is void due to frustration

[38] In the circumstances of this case, we find that the defendant had established the requirements of s 57(2) of the Contracts Act 1950 and the defendant's prayer for a declaration that the settlement agreement is void due to frustration is allowed. It follows that since the settlement agreement is void, no damages can flow from it. Therefore, the learned JC's order that the defendant pay damages in the sum of RM1,473,717.19, being the equivalent market value of the Acquaint Danga Residensi unit, to the plaintiffs ought to be set aside.

LAD under the SPA

[39] In view of our finding that the settlement agreement was void, then the rights of the parties reverted back to the SPA. Clause 22 (2) of the SPA provides that:

> If the Vendor fails to deliver vacant possession of the said Building in manner stipulated in Clause 23 within the time stipulated in subclause (1), the Vendor shall be liable to pay to the Purchaser liquidated damages calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price from the expiry date of the delivery of vacant possession in subclause (1) until the date the Purchaser takes vacant possession of the said Building. Such liquidated damages shall be paid by the Vendor to the Purchaser immediately upon the date the Purchaser takes vacant possession of the Building.

[40] It is not in dispute that under cl 22 of the SPA, vacant possession of the 'Monte Carlo' was to be delivered to the plaintiffs on/before 24 October 2014. However, the 'Monte Carlo' was only delivered on 4 May 2016 and vide a letter/statement of account dated 4 May 2016, the defendant had offered to pay a sum of RM993,698.63, being compensation for late delivery of vacant possession of the 'Monte Carlo'.

[41] In view of the admission by the defendant that the LAD under the cl 22(2) of the SPA was RM993,698.63, we would therefore allow the alternative prayer of the plaintiff in prayer (f) of para 21 of the plaintiffs' statement of claim, that is, 'ganti rugi am yang akan ditaksirkan atas ganti rugi kehilangan penggunaan hartanah tersebut yang dikira dari tarikh 24 Oktober 2014 sehinggalah tarikh milikan kosong hartanah diterima oleh plaintif'.

[42] We do not find the necessity to assess the damages as the defendant had admitted to the amount of the LAD.

Late payment interest

[43] In their counterclaim, the defendant had sued the plaintiffs for the sum of RM105,424.70 as interest on late payment of RM3.7m of the balance of purchase price of the 'Monte Carlo'. However during the trial, the defendant had revised this sum to RM102,547.95. The delay was for the period 2 July 2013 to 11 October 2013.

[44] The learned JC made a finding that the defendant had proven the fact of the delay in the disbursement and the quantum of the interest on late payment, in the sum of RM102,547.95.

[45] However, the complaint of the defendant was that the learned JC had made a finding that all parties were responsible for the delay in the disbursement of the loan. In para 46 of the GOJ, the learned JC found that there was failure on all parties culminating in delay in the release of the plaintiffs' housing loan, and that '... some of the compliance on the part of the defendant had been delayed for drawdown to be enabled, for which the defendant must also bear a fair share of responsibility'. The learned JC then decided that it would only be fair and equitable for each party to be equally liable and ordered that each party was to pay a third (1/3) or RM34,182.65 of the interest on late disbursement of the loan of RM102,547.95.

[46] Having considered the pleadings, we agree with the defendant that the JC's apportionment of a third (1/3) liability on the defendant was not supported by the plaintiffs' pleaded case. The plaintiffs had not pleaded contributory delay on the part of the defendant to facilitate the release of the loan from Affin Bank. Therefore the learned JC had committed an error in law as his finding went outside the ambit of the plaintiff's pleaded defence to the defendant's counterclaim. It is not the duty of the learned JC to assist the plaintiff by creating the defence of contributory negligence on the part of the defendant. In *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188, the Federal Court held as follows at p 202:

A [33] Second, *the proposition of the Court of Appeal was not even pleaded by the respondent.* The respondent's cause of action against the appellant was for breach of contract. Nowhere in the respondent's pleading, expressly or by implication, can we detect a claim for breach of a joint venture agreement arising out of a fiduciary duty placed upon the appellant in the capacity as principal of an agent. *It is a cardinal rule* B *in civil litigation that the parties must abide by their pleadings* ...

...

[35] On this, we would like to add that *it is not the duty of the court to invent or create a cause of action or a defence under the guise of doing justice for the parties lest it be accused of being biased towards one against the other.* The parties should know best as C to what they want and *it is not for the court to pursue a cavalier approach to solving their dispute by inventing or creating cause or causes of action which were not pleaded in the first place*. Such activism by the court must be discouraged otherwise the court would be accused of making laws rather than applying them to a given set of facts. (Emphasis added.)

D

[47] In the premise, we set aside the order of the learned JC to apportion a third (1/3) or RM34,182.65 of the late interest against the defendant.

E *Affin Bank's cross-appeal*

[48] Affin Bank had filed a cross-appeal against the learned JC's finding that Affin Bank was also liable for the delay in the release of the plaintiff's housing loan, and therefore the learned JC had ordered Affin Bank to pay a third (1/3) F or RM34,182.65 of the late interest to the defendant.

[49] The plaintiff's case against Affin Bank was that Affin Bank was responsible for the delay as the loan was approved on 15 August 2012, but the loan was only released on 11 October 2013. This clearly contradicts the G defendant's claim for late interest, due to the delay that had occurred only for the period 2 July 2013 to 11 October 2013. It was the defendant's pleaded case that they had issued the billing on 3 June 2013 with payments to be made within 21 days. When payment was only made on 11 October 2013, the H defendant claimed for late payment interest for the period 2 July 2013 to 11 October 2013.

[50] In fact, the plaintiffs' only evidence on the purported delay by Affin Bank was the sweeping statement by the first plaintiff that the delay, if any, I ' ... adalah disebabkan dan/atau disumbangkan sepenuhnya oleh pihak ketiga Tetuan Affin Islamic Bank Bhd selaku pemberi pinjaman tersebut yang mana pihak ketiga adalah di dalam kuasa penuh untuk melepaskan apa-apa jumlah wang yang berkaitan dengan kemudahan tersebut kepada defendan sebagaimana yang dituntut oleh defendan secara berperingkat dan

sesungguhnya tidak ada kena mengena dengan arahan, tindakan atau ketinggalan atau kecuaian kami selaku peminjam'. A

[51] Despite the plaintiff's pleading of a bare assertion of delay against Affin Bank and the failure of the plaintiff to adduce evidence of the purported delay attributed to Affin Bank (as shown above), the learned JC went on his own volition to scrutinise the chronology of the documentation, and from there made out a case of delay by Affin Bank, despite the same not being pleaded by the plaintiffs (see *RHB Bank Bhd*). B

[52] In any event, we agree with Affin Bank that it was not responsible for the delay in the disbursement for the period contended by the defendant. Pursuant to Affin Bank's letter of undertaking dated 23 May 2013 to the defendant, the loan would only be released after the memorandum of transfer and the charge have been presented for registration at the land office. This was only done on 1 August 2013. C D

[53] However, disbursement cannot be effected as the plaintiffs have yet to comply with the terms of the letter of offer dated 15 August 2012. The conditions precedent of the letter of offer dated 15 August 2012 issued by Affin Bank to the plaintiffs provides that the plaintiffs were to open an account with Affin Bank to facilitate the instalment payments. This was only done on 3 September 2013. E

[54] By the time the plaintiffs had opened the account on 3 September 2013, the letter of offer dated 15 August 2012, the letters of variation dated 20 February 2013 and 26 September 2013 have lapsed and Affin Bank had to issue another letter of variation dated 4 October 2013 to extend the loan facilities. This was accepted by the plaintiffs on 9 October 2013. On the same day (9 October 2013), the common solicitors had issued a re-advice for the disbursement of the loans within two days. Affin Bank then released the RM3.5m and RM200,000 to the defendant on 14 October 2013 to complete the drawdown in accordance with the bill dated 3 June 2013. F G

[55] Based on the facts enumerated above, we find that Affin Bank was not responsible for the delay in the disbursements. Affin Bank can only effect the disbursement once all the documentation have been secured, namely the registration of the memorandum of transfer and the charge, the compliance by the plaintiffs of the conditions of the letter of offer dated 15 August 2012 and the acceptance of the letter of variation dated 4 October 2013. All these relevant evidences were crucial as they fall within the defendant's counterclaim, which is between 2 July 2013 to 11 October 2013. However, we find that the learned JC had failed to take into account the above relevant evidence and this calls for appellate intervention. In *Paya Terubong Estates Sdn Bhd v Pusaka* H I

Warisan Sdn Bhd [1998] 2 MLJ 463; [1998] 2 CLJ 909, this court held as follows:

> One can, of course, quite well appreciate an appellate court's reluctance to disturb the primary exercise of discretion. This is because a Court of Appeal in a matter such as the present does not possess an original discretion, its initial function being one of review only. However, where, as in the present instance, *it is amply demonstrated that the judge in whom the primary discretion is vested has failed to take into account relevant considerations, it is the duty of this court to say so and to intervene and set matters right by an exercise of its own discretion*. (Emphasis added.)

[56] We therefore find that the plaintiffs have failed to prove, on the balance of probability, that Affin Bank had caused the delay in the disbursement, which lead to the penalty interest to be imposed. Affin Bank's cross-appeal is allowed with costs.

CONCLUSION

[57] For the reasons we had adumbrated, the errors committed by the learned JC warranted our appellate intervention. We set aside the High Court order dated 19 November 2018 and substitute the same with the admitted sum of LAD of RM993,698.63 under prayer 21(e) of the statement of claim to be paid by the defendant to the plaintiffs under the SPA. The defendant's counterclaim is allowed with judgment entered in terms of prayer 2 (a), (b) and (c) of the counterclaim. Affin Bank's cross-appeal is allowed and the order that Affin Bank was to pay the defendant the sum of RM34,182.65 is set aside. We also make an order for the plaintiffs to pay the defendant RM20,000 and Affin Bank RM5,000 as costs subject to allocatur.

Order accordingly

Reported by Ashok Kumar